

**DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA**

**IN THE MATTER OF NorthWestern
Energy's 2011-2012 Electricity Supply
Tracker**

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**REGULATORY DIVISION
DOCKET NO. D2012.5.49**

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COMMISSION

PROTECTIVE ORDER

PROCEDURAL HISTORY

1. On June 1, 2012, NorthWestern Corporation d/b/a NorthWestern Energy ("NWE") filed its annual Application for Approval of Electric Supply Deferred Cost Account Balance and Projected Electric Supply Cost. The Montana Public Service Commission ("MPSC") issued a Notice of Application and Intervention Deadline on June 15, 2012, and an Interim Order on Reconsideration (Order 72 1 9a) on June 29, 2012. The MPSC granted intervention to the Natural Resources Defense Council, the Human Resource Council, District XI, and the Montana Consumer Counsel, on July 11, 2012. The MPSC issued its Procedural Order in this matter July 27, 2012. The Order set an intervention deadline of July 9, 2012.
2. On July 13, 2012, MPSC issued its Data Request Nos. PSC-006 through PSC-013 to NWE, and on August 16, 2012, MPSC issued its Data Request Nos. PSC-014 through PSC-032 to NWE.
3. Subsequent to issuance of Data Request Nos. PSC-006 through PSC-013 and Data Request Nos. PSC-014 through PSC-032, NWE informed Powerex Corp. ("Powerex") on August 30, 2012, of the Data Requests and at which time Powerex recognized that the Data Requests encompassed Information containing Trade Secrets

of Powerex.

4. On September 6, 2012, Powerex filed its Motion to Intervene in the captioned docket for the limited purpose of filing for a Protective Order. Powerex simultaneously filed its Motion For Protective Order and Affidavit of Meredith Aitken in Support of Protective Order.

5. On _____, 2012, the MPSC published notice of the Motion for Protective Order in its weekly agenda, stating it would not rule on the Motion for at least 10 days, and that it would accept comments submitted prior to the ruling.

6. On September 6, 2012, NWE filed responses to Data Request Nos. PSC-006 through PSC-013 and Data Requests PSC-014 through PSC-032. In those responses, NWE indicated it was not including certain documents, correspondence and technical information within the scope of Powerex's Motion For Protective Order, pending the MPSC's action on Powerex's Motion.

FINDINGS OF FACT

7. Powerex has conducted business with NWE in the past and will likely continue to conduct business with NWE in the future. Aitken Affidavit ¶ 2. Powerex's interest is in protecting confidential trade secret information contained in documents possessed by NWE, including (i) information responsive to PSC-007(e) that includes documents and correspondence between Powerex and NWE and attachments to such correspondence concerning third-party replacement regulation service after the outage of the DGGS, and (ii) information responsive to PSC-017(b) including correspondence, attachments to such correspondence, and any documents relating to bids received, including draft

agreements, in response to NWE's 2011 RFP and any subsequent RFP for regulation service. *Id.* at ¶ 4.

8. The electrical generating industry in Montana and elsewhere in the West is highly competitive and product and service providers to this industry aggressively market their products and services. Aitken Affidavit ¶ 5. Possession of the Information for which protection is sought would give Powerex's competitors distinct competitive advantage based on knowledge of Powerex's negotiations and business dealings with NWE, as well as Powerex's commercially sensitive data relating to its products and services. *Id.* at ¶ 5.

9. Possession of the Information for which protection is sought would give other present and future potential competitors of Powerex distinct competitive advantage with respect to negotiations and competition with Powerex based on knowledge of Powerex's capabilities to offer customized products and the associated business practices. Aitken Affidavit ¶ 5.

10. Powerex has a direct and substantial interest in disclosure of the information contained in documents possessed by NWE which Powerex asserts are trade secrets. Powerex Motion For Protective Order ¶ 3.

11. Public disclosure of Powerex's confidential and trade secret information would cause Powerex economic injury. Aitken Affidavit ¶ 5.

12. Powerex has considered that the MPSC is a public body and that there is a constitutional presumption in favor of disclosing materials provided to the MPSC. Aitken

Affidavit ¶ 8.

13. Powerex has taken reasonable steps to maintain the secrecy the Information for which protection is sought. Powerex Motion For Protective Order ¶10; Aitken Affidavit ¶ 6.

CONCLUSIONS OF LAW

14. The PSC has jurisdiction over this matter pursuant to Title 69, chapter 3, MCA, and “may issue a protective order when necessary to preserve trade secrets . . . as required to carry out its regulatory functions.” MCA 69-3-105(2).

15. “Any person interested in and directly affected by the subject matter of any hearing or investigation pending before the commission may petition to become a party thereto.” ARM 38.2.2401. Petitions for intervention filed after the intervention deadline established by a Procedural Order must show good cause. ARM 38.2.2403.

16. Montana’s constitution imposes “an ‘affirmative duty’ on government officials to make all of their records and proceedings available to public scrutiny.” *Great Falls Tribune v. Mont. Pub. Serv. Commn.*, 2003 MT 359, ¶ 4, 319 Mont. 38. However, “a trade secret is one form of information in which there is a statutorily defined property right.” *Id.* at ¶ 59.

17. An entity seeking a protective order “must support its claim of confidentiality by filing a supporting affidavit making a prima facie showing that the materials constitute property rights which are protected under constitutional due process requirements.” *Great Falls Tribune*, ¶ 56. “The claimant’s showing must be more than conclusory” and

“must make clear . . . the basis for the request.” *Id.*; ARM 38.2.5007(3).

18. A motion for protective order must include a complete and specific nonconfidential identification, description and explanation of the information, item by item or by category of items which are alike, of all information for which protection is requested, suitable for meaningful use in testimony, arguments, public discussion, orders and the public record. ARM 38.2.5007(3)(b).

19. In order to claim a trade secret as the basis for a protective order, the claimant must demonstrate that: (1) It has considered the Commission is a public agency and that there is a Constitutional presumption of access to documents and information in the Commission's possession; (2) the claimed trade secret material is information; (3) the information is secret; (4) the secret information is subject to efforts reasonable under the circumstances to maintain its secrecy; (5) the secret information is not readily ascertainable by proper means; and (6) the information derives independent economic value from its secrecy, or that competitive advantage is derived from its secrecy. ARM 38.2.5007(4)(b).

20. “Information” includes “knowledge, observations, opinions, data, facts, and the like.” ARM 38.2.5001(3).

21. Powerex has made a *prima facie* showing that the correspondence, attachments to correspondence, including but not limited to reports, documents and technical data relating to Powerex products and services, which may be submitted to the MPSC by NWE in response to Data Requests Nos. PSC-007(e) and PSC-017(b), are all trade secrets entitled to protection under constitutional due process requirements and the

MPSC rules.

ORDER

IT IS HEREBY ORDERED THAT:

22. Powerex's Motion For Intervention for purposes of obtaining a Protective Order is granted;

23. Powerex's Motion For Protective Order is granted; and

24. Information submitted in accordance with this Protective Order shall be treated as confidential pursuant to ARM Title 38, subchapter 50.

DONE IN OPEN SESSION at Helena, Montana the ____ day of _____,
2012, by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

Travis Kavulla, Chairman

Gail Gutsche, Vice Chair

W.A. Gallagher, Commissioner

Brad Molnar, Commissioner

John Vincent, Commissioner

ATTEST:

Aleisha Solem
Commission Secretary

(SEAL)

NOTE: Reconsideration is not available in regard to the granting of a motion for protective order, but is available in regard to the denial of a protective order. ARM 38.2.4806. A person with proper standing may challenge a protective order. ARM 38.2.5008(3).

Protective Orders and Protection of Confidential Information

Nondisclosure Agreement

ARM 38.2.5012

Docket No. D2012.4.49, Order No. _____

Order Action Date: _____, 2012

I understand that in my capacity as counselor expert witness for a party to this proceeding before the commission, or as a person otherwise lawfully so entitled, I may be called upon to access, review, and analyze information which is protected as confidential information. I have reviewed ARM 38.2.5001 through 38.2.5030 (commission rules applicable to protection of confidential information) and protective orders governing the protected information that I am entitled to receive. I fully understand, and agree to comply with and be bound by, the terms and conditions thereof. I will neither use nor disclose confidential information except for lawful purposes in accordance with the governing protective order and ARM 38.2.5001 through 38.2.5030 so long as such information remains protected.

I understand that this nondisclosure agreement may be copied and distributed to any person having an interest in it and that it may be retained the offices of the provider, commission, consumer counsel, any party and may be further and freely distributed.

Typed or Printed Name

Signature

Date of Signature

Business Address:

Employer

Party Represented